United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with affidavit of Mailing

75-6092

To be argued by
CONSTANCE M. VECELLIO

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6092

P/S

WILLIAM L. EVERS, Executor of the Estate of
WILLIAM DANA MILLER,
Plaintiff-Appellant,

—*against*—

CASPAR WEINBERGER, Secretay of Health,
Education, and Welfare,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant-Appellee
225 Cadman Plaza East
Brooklyn, New York 11201

JOSEPHINE Y. KING,
CONSTANCE M. VECELLIO,
Assistant United States Attorneys,
of Counsel.

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6092

WILLIAM L. EVERS, Executor of the Estate of
WILLIAM DANA MILLER,
Plaintiff-Appellant,

—against—

CASPAR WEINBERGER, Secretary of Health,
Education, and Welfare,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal by plaintiff William Evers from an order of the United States District Court for the Eastern District of New York (Mishler, *J.*), entered August 7, 1975, in an action brought under Section 208(g) of the Social Security Act, 42 U.S.C. § 405(g) to review a final decision of the Secretary of Health, Education, and Welfare which denied retirement insurance benefits to William D. Miller[1] for 1966 through 1971 and directed that the overpayments which had been made for those years would not be waived. The District Court's order granted

[1] William D. Miller died during the pendency of this action and the executor of his estate was substituted in his place as party plaintiff.

the defendant's motion for summary judgment dismissing plaintiff's complaint, and denied plaintiff's motion for summary judgment.

Prior Proceedings

William D. Miller, who was born on January 6, 1900, completed an Application for Retirement Insurance Benefits on or about March 31, 1966. (Tr. 214-215). In that application, he stated that he was only applying for Medicare benefits since he was working as a consultant. (Tr. 215). In June of 1966, Mr. Miller filed a second Application for Retirement Insurance Benefits in which he stated that, from June of 1966, he did not expect to earn more than the statutory limit for retirement benefits, which limit was set forth in the form itself (Tr. 218).

Mr. Miller received monthly retirement benefits beginning in June of 1966 and continuing until March of 1972, when he was informed that his benefits were being stopped pending a determination of his actual retirement. (Tr. 225). A letter of March 30, 1972, from Mr. Miller's wife (Tr. 226) was treated as a request for reconsideration. A Reconsideration Determination, which found that Mr. Miller was employed and earned wages in excess of the statutory amounts for 1966 through 1972, was issued on July 10, 1972. It further found that all benefits paid to him during this period were overpayments, that he was not without fault in causing these overpayments, and that recovery of the overpayments would not cause undue financial hardship. (Tr. 228-234).

On August 16, 1972, Mr. Miller was notified that he had been overpaid $8,267.60 and that the overpayment would be recovered from benefits otherwise payable to him from March 1972 through May, 1975 and part of June, 1975. (Tr. 235). On September 11, 1972, he re-

quested a hearing. (Tr. 238). A hearing *de novo* was held before an administrative law judge on June 20, 1973 and continued to completion on August 8, 1973. (Tr. 51-213). The administrative law judge held that, although the employer-employee relationship continued to exist until December 1971 between Mr. Miller and the corporation for which he had worked, he did no work after January 1, 1968, and hence was entitled to benefits dating from that month. (Tr. 36).

On its own motion (Tr. 18-19), the Appeals Council reviewed the hearing decision and determined that Mr. Miller had worked during all the years in question (1966-1971), that he had earned more than the statutory maximum in each month, and that the overpayment could not be waived. (Tr. 7-15). This decision became the final decision of the Secretary. Mr. Miller was informed of this decision on August 21, 1974. On or about September 11, 1974, he commenced an action for review of this decision in the United States District Court for the Eastern District of New York.

Statement of Facts

William D. Miller, born on January 6, 1900, graduated from the University of Chicago in 1919 with a degree in geology. (Tr. 70). He spent many years (from 1920 until the early 1950's) working as an exploratory geologist. He often worked in remote tropical areas and in the early 1920's, he contacted malaria, (Tr. 70-74), and was required to take quinine as treatment. (Tr. 71). Evidence was introduced showing that prolonged treatment with quinine may produce deafness, (Tr. 448-449), and it is undisputed that Mr. Miller did suffer from a hearing impairment. The hearing impairment did not, however, prevent him from pursuing employment. He

worked in the geological field until 1957, when he retired from Esperanza Oil Corporation, of which he had been Vice-President and General Manager. (Tr. 73-74).

In 1950, Mr. Miller became a director and treasurer of Manhattan Direct Mail, Inc. ("MDM") and subscribed to thirty shares of its stock for $3,000. (Tr. 76). MDM prints letters, catalogs, and similar materials for its clients and mails them directly to individuals on lists provided by the client.

Mr. Miller subsequently became president of MDM, while remaining treasurer and a director thereof (Tr. 82), and he retained these positions throughout the entire time period in question in this action, despite his alleged retirement in June of 1966. Mr. Miller himself described the work he did for MDM as chiefly "to ride herd on the books" (Tr. 82), both before and after his retirement from Esperanza Petroleum Corporation. (Tr. 88). He also participated in the purchase of new machinery, in approving salary raises for employees, in cost analysis (Tr. 82-84), and in signing corporate checks. (Tr. 89).

Prior to his alleged retirement, Mr. Miller was earning approximately $600 a month at MDM. (Tr. 104). Thus, in 1965, his earnings totalled $7,800. (Tr. 218). In June of 1966, his salary was reduced to $135 or $140 a month. (Tr. 104). In 1968, however, he received a $10,000 "bonus" (Tr. 108), and a $5,000 "bonus" each year thereafter. Mr. Miller himself originally characterized these "bonuses" as *earnings* in his correspondence with the Social Security Administration. (Tr. 242-243). Thus, he reported his total *wages earned* in 1969 as $6,680.00, a sum not substantially different from the wages earned before his alleged retirement. (Tr. 243).

The corporate tax returns for MDM for 1968 list gross receipts of $336,719.39. (Tr. 263). A deduction

of $53,315.00 was taken for compensation of officers. (Tr. 263). This included the sum of $11,680.00 as the salary of William D. Miller. (Tr. 264). The form states that Mr. Miller devoted full time to the business. (Tr. 264). Similarly, in 1969 and 1970, MDM deducted $6,680.00 as Mr. Miller's salary, and described him as devoting full time to the business. (Tr. 269, 274). (The 1970 return was signed by Mr. Miller himself. [Tr. 273].)

The amounts of the "bonuses" given to Mr. Miller were not proportional to his ownership of MDM's stock. (Tr. 190-191). Mr. Miller, his wife, and his stepson all testified that the "bonuses" were, in effect, repayment to him of loans he had made to the corporation in its earlier years. (Tr. 107-109, 130-135, 192-193). There is no record of any such loans. (Tr. 145-149).

Despite the fact that the corporate tax returns described Mr. Miller as devoting full time to the business, Mr. Miller, his wife, and his stepson testified that he spent little or no time at the business. (Tr. 15, 106, 137, 141). However, on September 16, 1971, the manager of a bank located near the business and in which MDM maintained four or five accounts, stated that Mr. Miller was the signer of the checks for MDM and used to come in almost every day, although in the last eight or nine months he had been in only once or twice. (Tr. 252). On the same day (9/16/71), plaintiff's wife informed a Social Security investigator that plaintiff was still president of the company and that although he wasn't there that day, he had been there for the entire preceding day.

Finally, while it is clear that Mr. Miller suffered from a hearing impairment, it is *not* clear that this impairment became qualitatively worse in June of 1966 so as to prevent him from being able to do the kind of work for MDM which he had previously been doing. At the hear-

ing, he was asked the following question by his attorney: "Now in or about May of 1966, did you suffer an impairment of your hearing ability?" (Tr. 89).

He replied, "Well, I don't know if it was much worse . . ." (Tr. 90).

Thus, the factual issues in the case centered on: (a) the nature and extent of Mr. Miller's services subsequent to the date of his alleged retirement; (b) the effect of a hearing impairment on his ability to render such services; (c) whether the "bonuses" paid to Mr. Miller constituted earnings or repayment of loans.

As to (a) and (b), conflicting statements appear in the record. Judge Mishler upheld the secretary's finding that Mr. Miller performed services for the corporation during the years of his alleged retirement and that his hearing loss did not negate or prevent such performance. As to (c), the corporate tax returns for the "bonus" years treat the "bonuses" as salary in contrast to appellant's claim that they were repayments for loans, although no proof of such loans has been made. Here too, Judge Mishler agreed with the Secretary's findings that the "bonuses" were "remuneration from employment."

ARGUMENT

The District Court was correct in holding the Secretary's determination that William D. Miller rendered services for wages and received excess earnings in 1966-1971 was supported by substantial evidence.

Section 203(b) of the Social Security Act, 42 U.S.C. § 403(b), now provides, and provided at all times relevant herein, that if a beneficiary of old age retirement benefits continued to receive earnings after becoming entitled to benefits, deductions for such earnings are to be made against his benefits. 42 U.S.C. § 403(b) reads in pertinent part as follows:

> Deductions, in amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this title to which an individual is entitled, ... on the basis of such individual's wages and self-employment income, until the total of such deductions equal—
> (1) such individual's benefit or benefits under section 202 for any month . . .
>
> * * * * *
>
> if for such month he is charged with excess earnings under the provisions of subsection (f) of this section, equal to the total of benefits referred to in classes (1) and (2). If the excess earnings so charged are less than such total of benefits, such deductions with respect to such month shall be equal only to the amount of such excess earnings . . .

"Excess earnings" were earnings in excess of $125 per month prior to December 31, 1967, and in excess of $140 per month thereafter. 42 U.S.C. § 403(f)(3).

42 U.S.C. § 403(f) provided in pertinent part as follows:

> For purposes of subsection (b)—
>
> (1) . . . Notwithstanding the preceding provisions of this paragraph, no part of the excess earnings of an individual shall be charged to any month . . .
>
> * * * * *
>
> (E) in which such individual did not engage in self-employment and did not render services for wages . . . of more that [125] $140 . . .
>
> (3) For purposes of paragraph (1) . . . an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of [125] $140 multiplied by the number of months in each year except that of the first $1200 of such excess . . . an amount equal to one half thereof shall not be included . . . .

Finally, 42 U.S.C. § 403(f)(4)(B) created a presumption that a claimant had rendered services for wages [2] of more than $140 (or $125) per month, thus placing the burden of proof with respect to this issue on the claimant. See *Carlson* v. *Richardson*, 331 F. Supp. 1000 (D. Conn. 1971).

Thus, excess earnings during the time period at issue in the instant case were computed in the following manner: if an entitled individual had annual earnings of

---

[2] Under 20 C.F.R. § 404.1004(b), Mr. Miller is considered to be an *employee* of the corporation, not self-employed, and Judge Mishler held that Mr. Miller was an employee. (Volume I of Appellant's Appendix, p. 6.) Accordingly, the provisions of § 404.446 and § 404.447 relating to the "substantial services" test are inapplicable to the instant case.

more than $1680, (1500 prior to 1968), then one dollar for each two dollars of earnings between $1680 and $2880 (or $1500 and $2700) and one dollar for each dollar over $2880 (or $2700) would be deducted for those months in which the entitled individual was under age 72 and either worked for wages of more than $140 (125) a month or rendered substantial services in self-employment. *See* 20 C.F.R. § 404.431.

There is no question that an individual is free to arrange his business affairs in any way he wishes even if his purpose is to gain greater Social Security benefits than would otherwise be available. If, however, it is apparent that an individual has acted with this particular purpose in mind, it is incumbent upon the Secretary to scrutinize closely the transactions and the relationship of the parties involved. It is well established that where the Secretary finds that the realities of the situation do not accord with the alleged arrangement, the parties are to be treated as reality dictates. *See, e.g., Gordon* v. *Finch*, 437 F.2d 253 (8th Cir., 1971); *Skalet* v. *Finch*, 431 F.2d 452 (6th Cir. 1970); *Ludeking* v. *Finch*, 421 F.2d 499 (8th Cir. 1970); *Reynolds* v. *Gardner*, 381 F.2d 380 (4th Cir. 1967), *affg. per curiam*, 271 F. Supp. 676 (W.D. Va. 1966); *Dondero* v. *Celebrezze*, 312 F.2d 677 (2d Cir. 1963); *Newman* v. *Celebrezze*, 310 F.2d 780 (2d Cir. 1962); *Poss* v. *Ribicoff*, 289 F.2d 10 (2d Cir. 1961), *cert. denied*, 368 U.S. 902 (1962). "Determinations of an individual's earnings for Social Security purposes must be related to the reality of his connection with the labor market and cannot be based on paper allocations of income." *Perez* v. *Secretary of Health, Education and Welfare*, 353 F. Supp. 1282, 1284 (D. P.R. 1972). Similarly, the Social Security Regulations, 20 C.F.R. § 404.1026, define wages as remuneration for employment and indicate the name by which this remuneration is designated is not material.

In the instant case, the Appeals Council considered the fact that Mr. Miller's primary role in the corporation before his alleged retirement was not performing the relatively low level functions of operating the folding machine and making deliveries, but rather performing the more sophisticated functions of financial management and the giving of advice. These latter functions could continue to be performed by Mr. Miller despite his hearing impairment. (The cases cited by appellant in his brief which are concerned with disability benefits are inapplicable. In the instant case Mr. Miller's hearing difficulties were not disputed and are not now an issue.) The Appeals Council concluded that Mr. Miller was, in fact, the "moving force" of this small corporation, *Dondero* v. *Celebrezze*, *supra;* the fact that he might no longer be performing tasks such as operating the folding machine or making truck deliveries had no effect upon his continued value to the corporation. There is substantial evidence in the record to support the Appeals Council's conclusion that Mr. Miller did continue to perform significant management functions as evidenced by his retention of the title of President, his continued signing of checks, and by the corporate tax returns which describe him as devoting full time to the business.

The Appeals Council also considered the fact that Mr. Miller received "bonuses" for each of the years in question (the $10,000 bonus for 1968 was deemed to be a $5,000 bonus for 1967 and for 1968) and concluded that these bonuses must realistically be viewed as wages for services rendered. First, the bonuses could not be considered to be return on investment capital since the amount of the bonuses given to Mr. Miller, his wife and his stepson was not proportionate to the amount of stock held by each. Second, the Appeals Council did not consider persuasive the testimony that these amounts

represented repayments of money "loaned" to MDM in past years since there was no record of such loans and since bonuses had also been paid to Mr. Miller's wife and stepson who presumably had not made such loans. Thus, the Appeals Council concluded that Mr. Miller had not met his burden, pursuant to 42 U.S.C. § 403(f)(4)(B), of establishing that he had not rendered services for wages in excess of the exempt amount.

In *Sewell* v. *Celebrezze*, 216 F. Supp. 192 (D.S.D. 1963), cited by appellant at p. 32 of his brief, the Secretary concluded that a substantial portion of the claimant's share in undistributed corporate profits which were credited to him and available but not withdrawn constituted wages for services rendered. The court reversed, finding that the claimant's shares in *undistributed corporate profits* were bona fide returns on investments. In the instant case, however, the Secretary made no attempt to characterize undistributed corporate profits as wages, but simply characterized a "bonus," which was unquestionably received by Mr. Miller, as wages.

In *Gardner* v. *Hall*, 366 F.2d 132 (10th Cir. 1966), cited by appellant at p. 38 of his brief, the Secretary again allocated a portion of the corporation's *undistributed profit and income* to the claimant, in addition to allocating a portion of the claimant's wife's salary. The circuit court affirmed the district court's decision that the Secretary's findings were not supported by substantial evidence, holding in part "[we] find no authority which would empower the Secretary of Health, Education and Welfare to allocate a portion of the corporation's undistributed profit and income to [the claimant] as remuneration for his services." 336 F.2d at 135. Such a holding, of course, has no relevance to the Secretary's power to characterize a bonus, admittedly received, as remuneration for services.

Finally, in *Ford* v. *Ribicoff*, 199 F. Supp. 822 (E.D. Tenn. 1961), cited by appellant at p. 39 of his brief, the court reversed a finding by the Secretary that retirement pay received by the claimant was actually wages, concluding that, although claimant continued to serve as a director and vice president of the corporation after his retirement,

> [h]e did not have the right to hire or fire employees. He had no authority to sign checks, contract, purchase supplies, supervise or make operational decisions for the Corporation. He went to the office of the company at his own pleasure and assisted in minor matters more to occupy his mind than he did to serve the company. (199 F. Supp. at 826).

In the instant case, there has been no attempt to characterize the "bonuses" which are at issue as retirement pay. Moreover, the evidence on the record establishes that the Mr. Miller, unlike the claimant in *Ford*, did retain the power to sign checks and visited the bank regularly.

The Appeals Council properly concluded that Mr. Miller did not sustain his burden of establishing that his remuneration for services rendered to the corporation was not in excess of the allowable statutory amount for each of the years in question.

Moreover, the Secretary also properly determined that recovery of the resulting overpayment could not be waived since plaintiff was not without fault and recovery would not deprive the plaintiff of the necessities of life. 42 U.S.C. § 404(a)(1).

CONCLUSION

The holding of the District Court that the decision of the Secretary is based on substantial evidence on the record as a whole is correct and should be affirmed.

Respectfully submitted,

Dated: November 28, 1975

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant-Appellee
225 Cadman Plaza East
Brooklyn, New York 11201

JOSEPHINE Y. KING,
CONSTANCE M. VECELLIO,
Assistant United States Attorneys,
of Counsel.

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 28th day of November 19 75 he served ~~a copy~~ two copies of the within

Brief for Defendant-Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Charles Marks, Esq.
286 Fifth Avenue
New York, N. Y. 10001

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

28th day of November 19 75

Irene S. Cohen (Bevilacqua)

IRENE S. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0683960
Qualified in Kings County
Commission Expires March 30, 1977